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CASE NO. 84-998

**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM 1984**

ROBERT E. GIBSON, et al,

Petitioner,

vs.

GEORGE FIRESTONE,

Respondent.

**ON WRIT OF CERTIORARI TO**
**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

# MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

and

# ACCOMPANYING AMICUS CURIAE BRIEF

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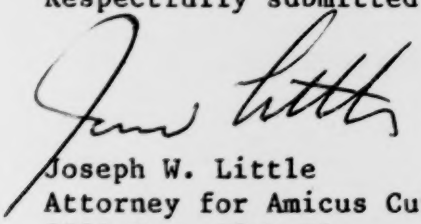
**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

1. Movant requests leave to file the attached amicus curiae brief in support of the petition for writ of certiorari.

2. Both Petitioners and Respondent have consented to the filing of this brief.

3. Movant, Joseph W. Little, a member of the Florida Bar and the Bar of the Supreme Court of the United States, filed amicus curiae briefs in support of Petitioners in the state court proceedings below and was denied an opportunity to argue before the Florida Supreme Court.

Respectfully submitted,



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# BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## Statement of Case

Amicus Curiae accepts the statement of the case propounded by Petitioners, as augmented in the Argument section below.

Although Petitioners raised three questions in this Court, this Amicus Curiae brief will consider only Question III, phrased as presented by Petitioners.

## ARGUMENT

DID THE COMBINATION OF THE CIRCUMSTANCES INVOLVING DENIAL OF PARTY STATUS TO ALL WISHING TO DEFEND THE BALLOT POSITION OF THE CONSTITUTIONAL AMENDMENT WITH THAT OF RETRO ACTIVELY APPLYING MODIFICATION OF THAT PETITIONERS IN MAKING LARGE EXPENDITURES TO ACHIEVE A BALLOT POSITION REACH THAT POINT OF FUNDAMENTAL UNFAIRNESS SUFFICIENT TO CAUSE A DENIAL OF THAT DUE PROCESS OF LAW PROVIDED BY THE XIV AMENDEMENT OF THE U. S. CONSTITUTION.

[Question III raised by Petitioners]

This case raises the question of whether the judicial actions of the Florida Supreme Court in the proceedings below deprived Petitioners of due process of law, consequently entitling them to the relief sought in this action. This Court has held on numerous occasions that judicial acts of state courts may constitute a denial of due

process in exceptional circumstances. Shelley v. Kraemer, 334 U.S. 1, 15, 68 S.Ct. 836, 842, 843, 92 L.Ed. 1161 (1948). As succinctly stated in Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680, 50 S.Ct. 451, 454, 74 L.Ed. 1107, "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government." The facts stated by Petitioners as augmented by the brief history below amply demonstrate this to be an exceptional example of judicial abuse of the federally protected right of due process, and not merely a harmless, in-the constitutional sense, case of a state court's overruling of precedent.

In Fine v. Firestone, 448 So.2d 984 (Fla. 1984), the decision of the Florida

Supreme Court challenged in this petition, the Florida Supreme Court openly changed the criteria that citizens must satisfy in obtaining signatures on petitions to place an initiative to amend the state constitution upon the ballot. In reliance upon the established criteria, laid down by the Florida Supreme Court, Petitioners expended great sums of money and amounts of energy and time to obtain more than 600,000 signed petitions from registered Florida voters, had them certified as true signatures by the various county supervisors of election in Florida, and received final certification from the Florida Secretary of State that the proposal would be placed on the November 1984 general election ballot.

An action was commenced by an objecting citizen in the District Court of Appeal, First District of Florida, to remove the

proposal from the ballot. Despite the refusals of the Florida Secretary of State and Florida Attorney General to defend the right of the proposal to stay on the ballot and the refusal of the Florida court to grant to Petitioners party status to defend it, the District Court of Appeal applied existing law and refused to remove the proposal from the ballot. Fine v. Firestone, 443 So.2d 253 (Fla. App. 1, 1983). The issue was certified to the Supreme Court of Florida, which reversed, overruling prior cases relied upon by the district court in the process. The Florida Supreme Court held that the "amendment must be removed from the 1984 general election ballot." 448 So.2d at 993.

In so holding, the Florida Supreme Court expressly "receded" from the guidelines laid down by that court itself in prior

cases. 448 So.2d at 989. Petitoners had closely adhered to and relied upon those guidelines in their petition drive, as was expressly acknowledged in the concurring opinion of Justice Shaw, when he said: "In my opinion, if we were to review the present initiative using the standard of review which we announced in Weber and Floridians [the cases overruled], we could only hold that the initiative meets the provisions of Article XI, section 3 and affirm the decision of the district court." 448 So.2d 984.

The recent history of changes in the criteria that must be met by citizen initiatives to amend the Florida constitution begins with the adoption of a new state constitution in 1968. Article XI, section 3 of the 1968 constitution initially stated: "The power to propose amendments to any section of this constitution by initiative is

reserved to the people." In Adams v. Gunter, 238 So.2d 824 (Fla. 1970) the Florida Supreme Court literally construed that provision by holding that an amendment to one section might not "substantially affect any other section or article of the Constitution." Id. at 831. Thereafter, in 1972 the people of Florida amended Article XI, section 3 to its present language, namely:

> The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that any such amendment shall embrace but one subject and matter directly connected therewith.

The change was from a one section to a one subject limitation.

The broaden preogative retained by the people in the amendment was elaborated by the Florida Supreme Court in Weber v. Smathers, 338 So.2d 819 (Fla. 1976) and, especially,

Floridians Against Casino Takeover v. Let's Help Florida, 363 So.2d 337 (Fla. 1978). In Floridians, the Florida Supreme Court prescribed the following guidelines to test the validity of initiative proposals to amend the constitution:

> First, "the 1972 change [to the initiative amendment process] was designed to enlarge the right to amend the Constitution by initiative petition." Second, the burden upon the opponent [the petitioner in this case] is to establish that the initiative proposal "is clearly and conclusively defective." Third, "the 'one subject' limitation was selected to place a functional, as opposed to locational, restraint on the range of authorized amendment." Last ... the one subject limitation should be viewed broadly rather than narrowly. [Footnotes omitted.]

Id. at 340. And finally, Floridians prescribed an overriding test to be applied to a constitutional amendment that has indirect effect upon the operation of several provisions of the constitution, as follows:

> Once the constitutional restraint is preceived to be functional [meaning the amendment has an indirect operational effect on some constitutional provision other than the one actually being amended] as opposed to locational [meaning the amendment directly amends the "locational" provision], substantial effect by the initiative proposed upon any other section or article of the Constitution becomes irrelevant. And, of course, "conflict" with existing articles or sections of the Constitution can afford no logical basis for invalidating an initiative proposal. Such an assertion ignores established patterns of constitutional construction. When a newly adopted amendment does conflict with preexisting constitutional provisions, the new amendment necessarily supersedes the previous provisions. Otherwise, an amendment could no longer alter existing constitutional provisions and the amendment process might, in every case, be frustrated by the judicial determination that a given proposal conflicts with other provisions.

Id. at 341, 342. (Emphasis added.).

In Fine v. Firestone, the Florida Supreme Court held:

> In Floridians we also held that the

> question of whether an initiative proposal conflicted with other articles or sections of constitution had "no place in assessing the legitimacy of an initiative proposal." 363 So.2d at 341. We recede from that language and find that how an initiative proposal affects other articles or sections of the constitution is an appropriate factor to be considered in determining whether there is more than one subject included in an initiative proposal.

448 So.2d at 990. The Florida Supreme Court retroactively applied the changed criteria to remove the purposed amendment from the ballot.

In sum, this brief history demonstrates that the Florida Supreme Court by judicial act changed the rules for amending the Florida constitution in mid-stream after Petitioners had relied successfully at great expense upon existing rules. The change was made at a time that made it impossible for Petitioners to obtain relief of any other kind. Moreover,

Petitioners have been denied an effective opportunity to protect their interests.

These facts are remarkably analagous to those in Brinkerhoff-Farris Trust & Savings Co. v. Hill, supra. In Hill, a taxpayer relied upon an established equitable procedure to test certain tax assessments in the Missouri courts. At the final stage of state judicial review, the Missouri Supreme Court refused judicial review of the issue presented on grounds that administrative review was available under the Missouri law. In reaching that decision, however, the Missouri Supreme Court expressly overruled one of its own opinions, relied upon by the Missouri taxpayer, that had firmly denied the existence of administrative relief in such a case. Moreover, in Hill, the time had run our through the operation of laches for

the taxpayer to seek the administrative review the Missouri Supreme Court now held was available.

Upon review of the state of facts in Hill, this Court stated:

> No one doubted the authority of the Laclede Case [the opinion overruled by the Missouri Supreme Court] until it was expressly overruled in the case at bar.
>
> ... We are of opinion that the judgment of the Supreme Court of Missouri must be reversed, because it has denied to the plaintiff "due process of law"--using that term in its primary sense of an opportunity to be heard and to defend its substantive right.
>
> First. It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense. The plaintiff asserted an invasion of its substantive right under the federal Constitution to equality of treatment.
>
> * * * * * *
>
> ... If the result above stated were attained by an exercise of the state's

legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious.... The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid ... state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.

It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction jurisdiction on this court.

But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff or the merits, although

> it may be observed that the plaintiff's claim is one arising under the federal Constitution and, consequently, one on which the opinion of the state court is not final; or with the accuracy of the state court's construction of the statute in either the Laclede Case or in the case at bar. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense--whether it has had an opportunity to present its case and he heard in its support. Undoubtedly, the state court had the power to construe the statue dealing with the state tax commission; and to re-examine and overrule the Laclede Case. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

281 U.S. 677-682, 50 S.Ct. 453,454.

The facts in the present case are legally indistinguishable from Hill.

Petitioners relied upon a settled rule of law laid down by the Florida Supreme Court. The Florida Supreme Court thereafter changed the law to Petitioner's great detriment without affording Petitioners a reasonable opportunity to protect their interests. This is a plain denial of due process.

## SUMMARY OF ARGUMENT

In reliance upon guidelines prescribed in opinions of the Florida Supreme Court, Petitioners expended great sums of money and amounts of energy and time to have an initiative to amend the Florida constitution placed upon the November 1984 general election ballot. The Florida Secretary of State certified the ballot position. Thereafter, in culmination of state legal proceedings in which the Florida

Secretary of State and Attorney General refused to defend the ballot position and in which Petitioners were refused party status, the Florida Supreme Court changed the existing criteria and held that the proposal must be removed from the ballot. These facts constituted a violation of the requirements of due process of law as articulated by this Court in Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra.

## CONCLUSION

For the reasons stated above, Amicus Curiae respectfully requests this Court to grant the writ and give the relief sought.

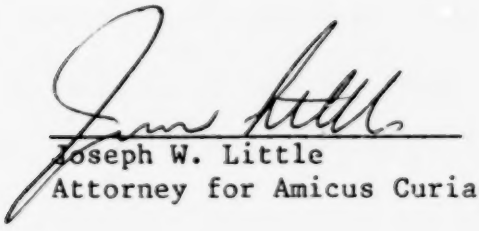
## CERTIFICATE OF SERVICE

I hereby that a true copy of the foregoing motion and brief was mailed this 1st day of January, 1985, to:

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